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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re ANDREW C., a Person Coming
Under the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW C.,

Defendant and Appellant.

A095968

**(Solano County
Super. Ct. No. J32168)**

In this juvenile delinquency case, defendant contends three gang-related conditions of probation are constitutionally defective, all three being vague and two of the three being overbroad. We affirm the disposition order.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was continued as a ward of the juvenile court based upon the court's findings that defendant committed an assault with a deadly weapon and exhibited a deadly weapon and based upon defendant's admission of two counts of misdemeanor battery on a police officer. The allegations arose from an incident in which defendant had been intoxicated. He was seen urinating near a motel swimming pool and confronted by three men, who told defendant to stop. Defendant began arguing with the men, who then left the area but returned about 10 minutes later. At that point, defendant approached the three men, pulled out a knife, and announced that he was a Piru from East

Palo Alto and was going to kill everyone. As the men began to walk away, defendant swung his knife at one of them, Greg Warren, cutting Warren's thumb and slashing his shirt. Police officers responded to a call of a man with a knife. Defendant fled from the officers but was eventually apprehended after a scuffle. As defendant was being placed in a patrol car, he kicked one of the officers.

At the disposition hearing, the juvenile court committed defendant to the custody of the probation officer for placement in a suitable program for alcohol and substance abuse. The probation officer's report indicated that defendant, then age 17, had admitted being a member of the Hillside Piru Gang in Vallejo since the age of 14. Among the terms and conditions of probation, the juvenile court imposed the following gang-related conditions as recommended by the probation officer: "[T]he minor is ordered not to be present at any known gathering area of the Hillside Piru Gang. . . . He is not to associate with any known members or associates of any gang. He is not to wear any gang-associated clothing or emblems, nor is he to possess any gang-related paraphernalia including but not limited to gang graffiti, symbols, photographs, members rosters, or other gang writings and publications. [¶] . . . [¶] . . . You are not to get any additional tattoos either permanent or temporary. The minor is not to be present at any court proceeding to which he himself is not a party or to which he has not been subpoenaed."

DISCUSSION

When a juvenile offender is adjudged a ward of the court and placed under the supervision of the probation officer, "[t]he court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).)¹ In an adult probation setting, a condition of probation will be

¹ For adult probationers, Penal Code section 1203.1, subdivision (j) authorizes the trial court to impose such "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer"

upheld unless it bears no relationship to the crime of which the offender was convicted, relates to conduct not in itself criminal, and requires or forbids conduct not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.) Conditions imposed on juvenile offenders may be even broader than those pertaining to adult offenders, because juveniles are deemed to be more in need of guidance and supervision than adults and because their constitutional rights are more circumscribed. (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033 [prohibiting tattoos]; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941 [limiting travel]; *In re Josh W.* (1997) 55 Cal.App.4th 1, 5 [requiring revelation of coparticipants]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241-1243 [limiting association with others].)

Here, defendant does not complain about all the gang-related conditions; his objections are focused on three conditions: (1) that he not associate with any known gang members or gang associates; (2) that he not wear any gang-related clothing or emblems; and (3) that he not possess any gang-related paraphernalia. Defendant makes no assertion that the conditions lack any reasonable relationship to criminality. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 623-626 [no association with gang members or display of gang indicia] ; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502 [no gang affiliation], disapproved on other grounds in *In re Sade C.* (1996) 13 Cal.4th 952, 962, fn. 2, 983, fn. 13; *In re Michael D.* (1989) 214 Cal.App.3d 1610, 1616-1617 [no entry into known gang areas].) Instead defendant argues that the conditions are constitutionally flawed in that all three conditions are vague in failing to specify the meaning of the term “gang” and that the latter two conditions are overbroad in failing to limit defendant to wearing or possessing articles known to him to be gang-related.

The Attorney General argues that defendant was required to raise an objection below and that by failing to do so defendant has waived the right to complain about the conditions of probation. Defendant responds with the assertion that if the waiver rule is applied, then his attorney was incompetent for failing to object.

We note, as the parties have acknowledged, a split of authority on the waiver question. The Supreme Court has held that a defendant may not complain of the

unreasonableness of conditions of probation for the first time on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 232-236.) Many courts have extended that waiver rule to issues of *constitutionality* as well, i.e., vagueness or overbreadth. (*People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152 [observe good conduct]; *In re Josue S.* (1999) 72 Cal.App.4th 168 [maintain satisfactory grades].) However, certain exceptions have been recognized, as when an objection would be futile (*In re Antonio C.*, *supra*, 83 Cal.App.4th at p. 1033) or when the condition violates a statute (*In re Khonsavanh H.* (1998) 67 Cal.App.4th 532, 536-537 [involuntary AIDS testing].) Recently, one court has held that a constitutional challenge to the vagueness or overbreadth of a probation condition is not waived when, as here, the objection presents a pure question of law that can be resolved without reference to the sentencing record. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 814-815.) We follow that authority and decline to apply the waiver rule here.

A. Knowledge

Defendant's overbreadth argument is supported by *People v. Lopez*, *supra*, 66 Cal.App.4th at pp. 628-629, in which the court held that probation conditions prohibiting the adult defendant from associating with gang members and from displaying gang indicia were unconstitutionally overbroad in prohibiting the defendant from associating with persons or displaying indicia not known to him to be gang-related. The court modified the condition to add the element of knowledge so as to make the condition narrowly drawn. (*Id.* at p. 638; see also *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816.)

We conclude that no such modification is necessary here. In *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117-1118, the Supreme Court, in assessing the validity of an injunction against gang activity, held that knowledge could be fairly implied in the injunction and to the extent it could not, "we are confident that the trial court will . . . impose such a limiting construction on paragraph (a) by inserting a knowledge requirement should an attempt be made to enforce that paragraph of the injunction." (*Id.* at p. 1117.) We likewise conclude that should defendant be accused of violating his

probation in the future, the element of knowledge will be read into the terms of his probation.

B. Meaning of “Gang”

People v. Lopez, supra, 66 Cal.App.4th 615, 629-634, further held that the probation conditions were unconstitutionally vague because the word “gang” was too uncertain to give constitutionally adequate notice. The court explained: “Although ‘gang’ has in the recent past likely acquired generally sinister applications, the word has considerable benign connotations.” (*Id.* at p. 631.) In light of the obvious purpose of the probation condition to deter future criminal conduct, the court held the term was sufficiently concrete when construed to mean a group primarily engaged in the pursuit of criminal activities. (*Id.* at p. 632.) Accordingly, the court modified the probation condition to incorporate the definition of “criminal street gang” set out in Penal Code section 186.22, subdivision (f). (*Lopez*, at pp. 634, 638.)

More recently, however, in *Justin S.* the court found no need to include a reference to the statutory definition of gang within a probation condition prohibiting association with gang members: “The definition is . . . fairly implied in the [probation] condition.” (*In re Justin S., supra*, 93 Cal.App.4th at p. 816, fn. 3; see *People ex rel Gallo v. Acuna, supra*, 14 Cal.4th at p. 1117.) We agree. In the context of the probation conditions, we can discern no meaning for the word “gang” other than a group whose members engage in a pattern of criminal activity. Should defendant be faced in the future with an allegation that he violated the terms of his probation, we are confident that the juvenile court will so construe the meaning of “gang.”² We deny defendant’s request to modify the probation conditions.

DISPOSITION

The judgment is affirmed.

² We take note that defendant was 17 years old at the time the probation conditions were imposed. By now, defendant is beyond the jurisdiction of the juvenile court. (Welf. & Inst. Code, § 602.)

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.